IN THE

INDIANA SUPREME COURT

NO.

Court of Appeals No. 49A02-0007-CV-433

MEGHAN RENE, *et al.*,	)	Appeal from the Marion Superior Court No. 12
Appellant (Plaintiffs below),	)	
	)	Cause No. 49D12-9805-CP-370
v.	)	
	)	
DR. SUELLEN REED, *et al.*,	)	
	)	Honorable Susan Macey Thompson, Judge
Appellees (Defendants below).	)	

OPPOSITION TO
PETITION TO TRANSFER

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OPPOSITION TO PETITION TO TRANSFER

This Court should deny transfer. As stated in Ind. Appellate Rule 57(H), the grant of transfer is a matter of judicial discretion, guided by six enumerated considerations:

(1) Conflict in Court of Appeals' decisions.
(2) Conflict with Supreme Court decisions.
(3) Conflict with federal appellate decision.
(4) Undecided question of law.
(5) Precedent in need of reconsideration.
(6) Significant departure from law or practice.

The Students' Petition to Transfer identifies only one undecided question of law: the test modifications for cognitive disabilities. In this regard, the Court of Appeals properly relied on pertinent administrative decisions and, in its published decision, provided ample guidance for anyone interested in this issue.

Moreover, the Students' Petition to Transfer does no more than argue that the Court of Appeals erred. The Students fail to assert that the Court relied on precedent that is in need of reconsideration, or that the Court's decision is a significant departure from law or practice. The Students' simply believe that the Court of Appeals got it wrong, which is not a proper basis for transfer.

A. The only undecided question of law pertains to testing modifications for cognitive disabilities.

The only undecided question of law that the Students identify is that of testing modifications for cognitive disabilities. Specifically, those Students whose IEPs provide that tests will be read aloud to them complain that the State does not permit them to have the reading comprehension portion of the GQE read to them. This issue is not proper for transfer because, although it may be a new issue of law, it does not require additional review at the Supreme Court level. The published Court of Appeals decision provides the necessary guidance as follows:

> The IEP represents "an educational plan developed specifically for the child [that] sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. [citation omitted] The GQE, by contrast, is an assessment of the outcome of the educational plan. We therefore decline to hold that an accommodation for cognitive disabilities provided for in a students' IEP must necessarily be observed during the GQE, or that the prohibition of such an accommodation during the GQE is necessarily inconsistent with the IEP.

Slip.Op., pp.16-17.

The mere fact that the Court of Appeals relied on administrative decisions does not demand that this Court issue a separate opinion. It is not surprising there are no other published decisions on whether a disabled student may have a reading comprehension test read aloud, as such a modification would *per se* render that test invalid. The Court of Appeals correctly found

that it was not error for the trial court to determine that the State need not honor such accommodations if they affect the validity of the exam. Slip.Op., p.18.

B. The Students improperly ask this Court to reweigh the evidence that they were exposed to curriculum that covered subjects tested on the GQE.

The Students seek to have this Court revisit the findings of fact made by the trial court and upheld by the Court of Appeals. The standard of review of trial court findings is whether the findings are clearly erroneous. In making such a determination, the appellate court considers only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and neither reweighs evidence nor assesses witness credibility. Ind. Rules of Procedure, Trial Rule 52(A). *Accord, In re: R.P.D. ex rel. Dick,* 708 N.E.2d 916, 919 (Ind.Ct.App. 1999). "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Yanoff v. Muncy,* 688 N.E.2d 1259, 1262 (Ind.1997).

The Court of Appeals applied the appropriate standard of review to the trial court's findings of fact and correctly upheld the finding that the Students were exposed to the curriculum tested on the GQE because it was not clearly erroneous. Slip Op., p. 11. The appellate court affirmed the lower court's finding that state law requires remedial assistance to all students who do not meet the academic standards required to pass the GQE and that, given the "multiple remediation opportunities mandated by state law for students who do not pass the GQE," it was implausible that the Students "were not exposed throughout their high school career to the subjects tested on the GQE." FOF 7, R. 1375; Slip Op., p.13.

The record is replete with facts to support this finding and the appellate court's affirmance thereof. The record shows and the trial court found that the GQE is administered initially in the fall to allow time for additional help during the school year for each student who fails to pass the GQE. FOF 6, R. 1374, citing Def. Inj. Doc. 13, ISTEP Parent and Student Guide

at 7. Based on the record, the trial court also found that schools have an obligation to hold a conference with the parents of every student who does not pass the GQE to discuss a remediation plan for that student based on the student's test results. *Id.*, citing Def. Inj.Doc. 6, Zaring Dep. at 29, R. 500. *See also* Ind. Code § 20-10.1-16-7(e). As the record demonstrates and the trial court concluded, the State funds remediation with grants ranging from $20 to $160 per pupil. *Id.* at 1375, citing Def. Inj.Doc. 15, LSA Report at 6, R. 884.

The record shows that each school is required to demonstrate the alignment of its curriculum with the state educational proficiencies through the Performance-Based Accreditation process. *See* Def. Inj. Doc. 6, Zaring Dep. at 27, R. 498. The record also contains the Achieve Report, an outside study by an independent, bipartisan organization, to further demonstrate that the GQE was aligned to the state standards. FOF 8, R. at 1376-1377, citing Def. Inj. Doc. 20, Achieve Report at 3, R. 1245.

Moreover, the record also shows that Indiana at all times relevant had one curriculum for all students. As the trial court found, Indiana has a policy of mainstreaming disabled students with the general student population. FOF 1, R. 1368. Indiana law has at all relevant times provided that "children with disabilities shall receive credit for school work accomplished on the same basis as normal children who do similar work." Ind. Code § 20-1-6-3(g). *Id.*

Thus, the record clearly supports the trial court's finding with regard to the Students' exposure to the subjects tested on the GQE and the Court of Appeal's determination that the findings is not clearly erroneous. The appellate court's ruling on this issue provides no basis for transfer.

C. The Students ignore the *Ambach* decision, which holds that three-years notice of an exam requirement satisfies due process.

The Students acknowledge that they had at least three years notice of the GQE requirement. Pet. for Trans., p. 6. But they ignore the logic and persuasive reasoning of *Board of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach*, 90 A.D.227, 458 N.Y.S.2d 680 (N.Y. App.Div.1982), *aff'd* 60 N.Y.2d 758, 469 N.Y.S.2d 669, 547 N.E.2d 775 (N.Y. 1983), *cert denied* 465 U.S. 1101 (1984), which is that "the three-school-year notice . . . was not of such a brief duration as to prevent school districts from programming the IEPs of [remedially handicapped children] to enable them to pass the basic competency tests required for diploma graduation." 90 A.D.2d at 233. Under the reasoning of *Ambach* and other cases discussed in the State's appellate brief, the Court of Appeals correctly found that the trial court did not err in determining that the State provided adequate notice to the Students that they would be subject to the GQE requirement. Slip.Op., p.18.

D. The Students ignore the holding of *Brookhart* regarding remediation as an effective remedy.

In *Brookhart v. Illinois State Board of Education,* 697 F.2d 179 (7th Cir. 1983), the Seventh Circuit observed that "[s]ubstantively, the due process right is not a right to a diploma, but rather a right to adequate notice in order to prepare for the new requirement." 697 F.2d at 188. The Court, therefore, held that the proper remedy for the inadequate notice was not receipt of a diploma but rather a requirement that the school district provide "free, remedial, special education classes to ensure exposure to the material tested on the test and a reasonable opportunity for plaintiffs to learn that material." *Id.* Here, the Court of Appeals correctly found that the trial court did not err in determining that the remediation offered by the State was an adequate remedy for any due process violation. Slip.Op., p.18.

The Students wanted an order enjoining the State from enforcing the GQE until it is a fair test of what disabled students have been taught. But the two cases on which the Students rely [*Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981) and *Anderson v. Banks*, 520 F.Supp. 472 (S.D.Ga. 1981), *app.dnd* 730 F.2d 644 (11th Cir. 1984)] are inapposite because they are not IDEA cases. The remediation remedy simply wasn't available in those cases. As argued above, the Court of Appeals correctly upheld the trial court's determination that the GQE is a fair test of what disabled students are taught.

E. The Students ignore the statutory waiver provision.

The Students continue to ignore the State's statutory waiver process as an alternative means to a diploma. The statutory waiver vests in the local case conference committee the power to recommend and in the local school corporation the power to issue a diploma to a student who does not pass the GQE. Thus, the Students' claim that a student must pass the GQE to receive a diploma is erroneous. Specifically, any student who qualifies for a waiver cannot complain of being denied a diploma solely because of the GQE requirement.

Conclusion

The Court should deny transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon the following counsel of record by United States mail, first class postage prepaid, on August 10, 2001:

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